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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

CLIFF GARDNER et al., Plaintiffs and Respondents, v. ARNOLD SCHWARZENEGGER et al., Defendants and Appellants.	A125000 (Alameda County Super. Ct. No. RG06-278911)

Defendants Governor Arnold Schwarzenegger, Attorney General Edmund G. Brown Jr., and Secretary of State Debra Bowen (collectively defendants) appeal from an order awarding plaintiffs Cliff Gardner, Drug Policy Alliance, and California Society of Addiction Medicine (collectively plaintiffs) $423,975 in attorney fees. We recently affirmed the judgment for plaintiffs in this action, which enjoined enforcement of legislation—Senate Bill No. 1137 (2005-2006 Reg. Sess.) sections 1 through 12 (Stats. 2006, ch. 63, §§ 1−12; hereafter Senate Bill 1137)—that had sought to amend the Substance Abuse and Crime Prevention Act of 2000 (hereafter Proposition 36). (*Gardner v. Schwarzenegger* (2009) 178 Cal.App.4th 1366, 1369 (*Gardner I*).) Defendants do not dispute plaintiffs' entitlement to attorney fees under the private attorney general statute (Code Civ. Proc., § 1021.5),[1] but contest the amount of the award against them. Defendants argue that the court erred in: accepting the hourly rates claimed by plaintiffs' attorneys, awarding a multiplier, and failing to apportion some

[1] Subsequent statutory references are to the Code of Civil Procedure.

responsibility for the award to other defendants in the case. We find no abuse of discretion as to any of these determinations, and affirm the order.

I. BACKGROUND

Proposition 36 generally requires that those convicted of nonviolent drug possession offenses initially receive probation with drug treatment, rather than incarceration, and provides that all legislative amendments " 'to this act shall be to further the act and shall be consistent with its purposes.' " (*Gardner I, supra*, 178 Cal.App.4th at pp. 1369−1370.) Plaintiffs successfully argued that certain sections of Senate Bill 1173, including those that permitted incarceration for drug-related probation violations, when that sanction would be prohibited by Proposition 36, were inconsistent with the purposes of the Proposition. (*Gardner I, supra*, at pp. 1377−1380.) Plaintiffs also successfully argued that Senate Bill 1137's provision for a popular vote on the bill, if any part of it was invalidated, was itself invalid. (*Gardner I, supra*, at pp. 1369, 1380.) Plaintiffs in this suit effectively prevented enforcement of Senate Bill 1137 by obtaining a temporary restraining order the day after the bill was signed into law by the Governor, a preliminary injunction, and a summary judgment that included a permanent injunction and declared the bill invalid in its entirety. (*Gardner I, supra*, at p. 1373.)

Plaintiffs' counsels' work on issues in the case spanned the period from February 2004 to February 2009. Time from February 2004 to June 2006 was spent analyzing the enforceability of provisions that were eventually enacted through Senate Bill 1137. After Senate Bill 1137 was passed by the Legislature on June 27, 2006, plaintiffs' counsel sent the Governor a letter warning him that the legislation was invalid and urging him to veto it.[2] "Otherwise," the letter stated, "we will bring a lawsuit, which we are confident will result in the State losing and being required to pay attorneys' fees."

Plaintiffs submitted evidence in the case that jail sentences imposed under Senate Bill 1137 would have cost counties "roughly $11.2 million per year."

[2] As we observed in the prior appeal, the Legislative Counsel had also opined that incarceration provisions incorporated into Senate Bill 1137 would be improper legislative amendments of Proposition 36. (*Gardner I, supra*, 178 Cal.App.4th at p. 1371.)

II. DISCUSSION

A. Attorney Fee Calculations and the Scope of Appellate Review

"In determining a fee award under section 1021.5 the trial court must first determine a touchstone or lodestar amount based upon the time spent and the reasonable hourly compensation for each attorney. [Citations.] Once the lodestar amount is determined the court looks to a variety of other factors which may justify either the augmentation or the diminution of the lodestar sum." (*Californians for Responsible Toxics Management v. Kizer* (1989) 211 Cal.App.3d 961, 970 (*Kizer*).) Those factors include: "(1) the novelty and difficulty of the questions involved, and the skill displayed in presenting them; (2) the extent to which the nature of the litigation precluded other employment by the attorneys; (3) the contingent nature of the fee award, both from the point of view of eventual victory on the merits and the point of view of establishing eligibility for an award; [and] (4) the fact that an award against the state would ultimately fall upon the taxpayers . . . ." (*Ibid.*) "[A]ny one of those factors may be responsible for enhancing or reducing the lodestar." (*Krumme v. Mercury Ins. Co.* (2004) 123 Cal.App.4th 924, 947 (*Krumme*).)

The determinations at issue are reviewed for abuse of discretion. (*Vasquez v. State of California* (2008) 45 Cal.4th 243, 251 [awarding fees under § 1021.5]; *Kizer*, *supra*, 211 Cal.App.3d at p. 973 [setting lodestars]; *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 581 [calculating multipliers]; *Feminist Women's Health Center v. Blythe* (1995) 32 Cal.App.4th 1641, 1672, fn. 7 [apportioning awards based on culpability].) "We will not disturb the trial court's ruling absent a showing that there is no reasonable basis in the record for the award." (*RiverWatch v. County of San Diego Dept. of Environmental Health* (2009) 175 Cal.App.4th 768, 776 (*RiverWatch*).) "The ' "experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong." ' " (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132 (*Ketchum*).)

B. Hourly Rates

Plaintiffs requested lodestar fees of $233,777.50 for work on the merits of the case, based on hourly rates of: $640 for Daniel Abrahamson, a 1991 law school graduate and Director of Legal Affairs of plaintiff Drug Policy Alliance (DPA); $590 for Jonathan Weissglass, a 1994 law school graduate and partner in the San Francisco law firm of Altshuler Berzon LLP (AB); $500 for Stacey Leyton, a 1998 law school graduate and partner at AB; $445 for Theshia Naidoo, a 2000 law school graduate and staff attorney at DPA; $200 for law clerks at AB; and $195 for a paralegal at AB. Fees of $14,868 were requested for work on the fee motion based on Weissglass's $590 hourly rate. Detailed time records were submitted for all of the compensation sought.

The motion was supported by declarations of Michael Rubin, an AB partner and fee litigation expert, who stated that many courts had found AB's commercial hourly rates to be consistent with the market rate for San Francisco attorneys with comparable skill and experience. Rubin identified three such cases involving AB's rates in 2007 and 2008, and he opined that "the hourly rates requested for the attorneys, law clerks, and paralegals in this litigation are at or below the market rates for comparably qualified and experienced counsel handling similarly complex litigation in the Bay Area and for law clerks and paralegals." Weissglass declared in support of the motion that: he and Leyton had considerable experience litigating constitutional issues; his hourly rate and those of other AB personnel had been found reasonable in a San Francisco Superior Court case in September 2008; AB's rates were comparable to those charged by the law firm of Morrison & Foerster LLP; and he had been paid $590 per hour by AB clients. Abrahamson declared in support of the motion that he had co-authored Proposition 36, and that DPA had a "nationally recognized expertise in the field of drug treatment as an alternative to incarceration."

Defendants presented no evidence in opposition to the motion, but cited cases in their points and authorities where Bay Area attorneys were awarded fees at lower hourly rates than those claimed by plaintiffs' counsel here. (*Pande v. ChevronTexaco Corporation, et al.* (N.D.Cal. Apr. 1, 2008, No. C-04-05107 JCS) U.S. Dist. Lexis 87584

[2008 WL 906507] (*Pande*); *Saldana-Neily v. Taco Bell of America, Inc.* (N.D.Cal. Mar. 24, 2008, No. C04-04571 MJJ) U.S. Dist. Lexis 22915 [2008 WL 793872] (*Saldana*); *Petroleum Sales, Inc. v. Valero Refining Company-California, et al.* (N.D.Cal. Sept. 11, 2007, No. C 05-3526 SBA) U.S. Dist. Lexis 70205 [2007 WL 2694207] (*Petroleum*).) In *Pande, supra,* U.S. Dist. Lexis 87584 at pages *12−*15 [2008 WL 906507 at pages *4−*5], an employment case, law firm partners who worked for the prevailing plaintiff, supported by the declaration of Michael Rubin, sought compensation at the rates of $700 and $600 per hour, but the court awarded them only $575 and $400 per hour. Fees of $370 per hour for an associate attorney and $200 per hour for a paralegal were requested in *Pande*, but the awards for their work were limited to $200 and $140 per hour, respectively. (U.S. Dist. Lexis 87584 at pp. *15−*18 [2008 WL 906507 at pp. *5−*6]) In *Saldana, supra*, U.S. Dist. Lexis 22915 [2008 WL 793872 at pages *5−*6], a disability discrimination case, the prevailing party requested and obtained fees of $435 per hour for an attorney who had practiced for 38 years, and $275 per hour for an attorney who had graduated from law school in 2001. In *Petroleum, supra*, U.S. Dist. Lexis 70205 at pages *19−*20 [2007 WL 2694207 at page *7], a franchise case, fees of $120 per hour were awarded for paralegal work. Based on these cases, defendants argued that fees for Abrahamson and Weissglass should be limited to $400 per hour, those for Leyton and Naidoo limited to $300 and $275 per hour, respectively, and those for law clerks and paralegals limited to $120 per hour. Defendants calculated that these adjustments would have reduced the lodestar to $140,619.

The court awarded a lodestar of $233,777.50, plus the $14,868 requested for work on the fee motion—the full amount requested—finding that "while the hourly rates claimed by the timekeepers on the case are high, they are within the range of hourly rates charged by lawyers of similar skill in the Bay Area."

The court's finding was supported by plaintiffs' evidence and was not clearly wrong. The determination must therefore be affirmed. (*Ketchum, supra,* 24 Cal.4th at p. 1132; *RiverWatch, supra*, 175 Cal.App.4th at p. 776.)

Defendants' cases were distinguishable. None of them appeared to have involved issues of first impression or public interest such as those here. As plaintiffs point out, requested rates were reduced in *Pande* and *Petroleum* in part because of deficiencies of proof not present here. (See, e.g. *Pande*, *supra*, U.S. Dist. Lexis 87584 at p. *11 [2008 WL 906507 at p. *3] [no evidence supported claimed rate other than counsel's own declaration]; *Petroleum*, *supra*, U.S. Dist. Lexis 70205 at p. *18 [2007 WL 2694207 at p. *6] [claimed rate exceeded moving party's own evidence as to what was reasonable].) *Pande*, *supra*, U.S. Dist. Lexis 87584 at p. *14 [2008 WL 906507 at p. *4] and *Petroleum*, *supra*, U.S. Dist. Lexis 70205 at p. *18 [2007 WL 2694207 at p. *6] *supported* the decision here insofar as they approved hourly rates of $575 and $616, respectively, as did the opinion in *Saldana*, *supra*, U.S. Dist. Lexis 22915 [2008 WL 793872 at p. *6] insofar as it approved all of the rates claimed. Thus, defendants' authorities did not dictate a different outcome in this case.

C. Multiplier

Defendants' principal argument is that the court erred in augmenting the fee award with a 1.75 multiplier on all fees other than those incurred in connection with fee issues.[3] Plaintiffs had requested a multiplier of 2.5.

Defendants submit that the court failed to adequately explain why a multiplier was warranted. They liken the situation here to that in *Ramos v. Countrywide Home Loans, Inc.* (2000) 82 Cal.App.4th 615 (*Ramos*), where the trial court's explanation for the granting of a 2.5 multiplier was simply that "enhancement of the lodestar fee amount is appropriate given the risks undertaken, the complexity of the issues, the skill displayed, the preclusion of other employment and the public interests served" (*id.* at p. 620; italics omitted). This "mere[] list[ing] [of] the enhancement factors used, without a more complete explanation of their applicability in this context" was "virtually no explanation for the basis of the substantially enhanced award of fees and costs" in the case. (*Id.* at

[3] Defendants note that the court made a minor miscalculation when it applied the multiplier, awarding $409,107 for work apart from the fee motion, rather than $409,110.62 ($233,777.50 x 1.75). Plaintiffs do not complain about the discrepancy.

p. 624.) The court reversed the fee order, with directions to "make appropriate findings on the factors recognized by case law to explain [the application of a multiplier] in such a manner as to make meaningful appellate review possible." (*Id.* at p. 629.)

The trial court here devoted five paragraphs of the fee order to the multiplier issue. After a paragraph setting forth the relevant factors, the court wrote:

"5. [T]he novelty, difficulty, skill, opportunity cost, and results obtained factors are all recognized already in the plaintiffs' lodestar figure, which the court has accepted without modification. The attorneys in this case did a very skillful job, without question. But this fact is already recognized by the high hourly rates they charge, which are commensurate with the rates received by highly skilled lawyers in the Bay Area legal market.

"6. That leaves two additional factors for consideration: risk, and the fact that the award in this case will fall on the taxpayers. With respect to the first factor, the court concludes that a multiplier here is mandatory. Society cannot expect skilled lawyers to give up fixed fee, paying hourly work in favor of work in which they might either receive their hourly rate or nothing, without some compensation for risk. The effect of such a system would be to dramatically lower the effective hourly rate for public interest work and drive away competent lawyers.

"7. However, even the plaintiffs recognize that the State of California is currently experiencing an unprecedented financial crisis. . . . The plaintiffs' argument that they should receive a higher award because the litigation saved the taxpayers money in the long run . . . is not persuasive. The court must fashion an award that recognizes the risk taken by plaintiffs' counsel but does not unduly burden the taxpayers.

"8. In light of all these considerations, the court concludes that a multiplier of 1.75 is appropriate. . . ."

The court thus went far beyond a mere listing of factors as in *Ramos, supra*, 82 Cal.App.4th 615, and provided a thorough, reasoned explanation of its thinking with respect to the multiplier issues. The explanation was sufficient to permit meaningful appellate review and was not inadequate.

Defendants maintain that the multiplier granted here cannot be justified based solely on the contingent risk factor, but a multiplier may be based on a single relevant factor (*Krumme, supra,* 123 Cal.App.4th at p. 947), and case law supports the trial court's decision. As the court recognized, a multiplier for contingent risk "bring[s] the financial incentives for attorneys enforcing important constitutional rights . . . into line with incentives they have to undertake claims for which they are paid on a fee-for-services basis." (*Ketchum, supra,* 24 Cal.4th at p. 1132.) While a court is not required to award a multiplier for contingent risk (*id.* at p. 1138), generally " '[a] contingent fee must be higher than a fee for the same legal services paid as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. The implicit interest rate on such a loan is higher because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of conventional loans.' " (*Id.* at pp. 1132−1133.) Even if counsel has a right to statutory attorneys fees, "there is, nevertheless, a great element of contingency in any fee system that rewards only attorneys for prevailing parties" (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 400, fn. 11), and "[o]ur courts have recognized that an enhanced fee award is necessary to compensate attorneys for taking such risks" (*Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1217).

Defendants note that this case was not entirely a contingent fee matter for the AB firm, because the firm had agreed to accept payment from plaintiffs at a discounted rate of less than $200 per hour. In determining whether to award a multiplier, "the trial court should consider whether . . . the client has agreed to pay some portion of the lodestar amount regardless of outcome." (*Ketchum, supra,* 24 Cal.4th at p. 1138.) We have no cause to believe that the trial court overlooked this partial mitigation of the firm's contingent risk, and the court had discretion to determine the weight that consideration deserved. Defendants venture that "the fee risk to [DPA was] simply nonexistent" because, as a co-author and leading proponent of Proposition 36, DPA "was going to

pursue this litigation under any circumstances." However, DPA had no prospect of recovering any of its attorney fees unless it prevailed in the action.

The award of a multiplier for the contingent risk in this case was not an abuse of discretion.

D. Apportionment of Liability

Nor was it an abuse of discretion for the court to refuse to apportion any fee liability to defendants the Alameda County District Attorney and the Alameda County Sheriff (collectively the County Defendants).[4]

The County Defendants unsuccessfully opposed plaintiffs' application for a preliminary injunction and motion for summary judgment on the grounds that they had no role in enacting Senate Bill 1137 and were not proper parties to the litigation. Plaintiffs estimated in their fee motion that "the County Defendants [were] responsible for approximately five percent of the lodestar based on the issues the County Defendants raised that would not otherwise have been in this case . . . ." The County Defendants objected to payment of any fees on the grounds, again, that they were not responsible for enacting Senate Bill 1137 and were "unnecessary" to the litigation.

The court declined to hold the County Defendants responsible for any of plaintiffs' fees, reasoning that "[t]hey did not cause the challenged statute to come into being, and they did not have any opportunity to prevent this litigation from taking place. The Sheriff is obligated to enforce the law as written. . . . The . . . same is true of the District Attorney, [who] . . . may not decline to enforce a statute enacted by the Legislature simply because a plaintiff has sued to invalidate it, or even if he disagrees with it or thinks the law is bad policy."

Defendants do not dispute this reasoning, but argue that the court should have apportioned five percent of the lodestar to the County Defendants because the County

[4] Thomas Orloff, in his official capacity as the Alameda County District Attorney, and Charles Plummer, in his official capacity as the Alameda County Sheriff, were named in the First Amended Complaint as defendants in the case. Gregory Ahern was the Alameda County Sheriff when the fee motion was litigated.

Defendants "took actions that undeniably required [plaintiffs] to do work that would not have been otherwise necessary" in the case. That fact did not, however, mandate apportionment of a share of the fee award to the County Defendants. (*Kizer*, *supra*, 211 Cal.App.3d at p. 976 [party "misread[] California law when it sa[id] that one defendant may not be charged for work attributable to another"].) The court could reasonably find that defendants should bear the entire fee liability given their clearly greater culpability in the matter. (See *ibid.* [liability may be apportioned based on comparative fault].)

III. CONCLUSION

The fee order is affirmed. Plaintiffs are entitled to recover from defendants their reasonable attorney fees on appeal in an amount to be determined by the trial court.

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Marchiano, P.J.

We concur:

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Margulies, J.

_____
Banke, J.